

FILED BY CLERK

AUG 13 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0203
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
WESLEY ALLEN HOLLIS,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000615

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Joseph L. Parkhurst

Tucson
Attorneys for Appellee

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ESPINOSA, Judge.

¶1 Appellant Wesley Hollis, along with two codefendants, was charged with armed robbery, aggravated robbery, two counts of aggravated assault with a deadly weapon or dangerous instrument, and two counts of disorderly conduct. The charges

arose out of an incident in June 2010 during which Hollis's codefendant forced one of the victims, the manager of a sporting goods store in a Sierra Vista shopping mall, to give the men a bank deposit bag containing the store's cash receipts and empty his pockets by threatening R.D. with an assault rifle as he and his girlfriend, M.R., and their two-year-old child were getting into their car. A jury found Hollis guilty of all but count four of the indictment, which was the charge of aggravated assault of M.R. On appeal, Hollis contends there was insufficient evidence to support his convictions for aggravated assault of R.D. and disorderly conduct as to R.D. and M.R. We affirm.

¶2 In determining whether there was sufficient evidence to support the verdicts, we view the evidence in the light most favorable to sustaining them, reversing the convictions only if there is no substantial evidence to support them. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence is that which "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). It is for the jury to resolve any conflicts in the evidence and assess the credibility of witnesses. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). We do not reweigh the evidence on appeal. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do, however, review de novo whether there was sufficient evidence as a matter of law to sustain the jury's guilty verdicts. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there

sufficient evidence to support the conclusion reached by the jury.” *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶3 Count three of the information charged Hollis with aggravated assault of R.D., in violation of A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2), and included as a possible basis for his culpability that he had acted as an accomplice pursuant to A.R.S. §13-303. Counts five and six, respectively, charged him with disorderly conduct based on his having recklessly handled or displayed an AK-47 assault rifle with the intent to disturb the peace or quiet of R.D. and M.R., in violation of A.R.S. § 13-2904(A)(6), and also included accomplice liability as a possible means of his having committed the offense. The evidence established Hollis was a former employee of the sporting-goods store, specializing in shoe sales, and had worked under R.D. for approximately six months until about three months before the robbery. Hollis was familiar with the store’s deposit procedures and testified at trial he had accompanied R.D. when R.D. had made the evening deposits. Hollis knew M.R. well and testified at trial that M.R. often was at the store at closing time and drove R.D. to make the bank deposits, with Hollis following them to the bank.

¶4 In the summer of 2010, codefendants Darrick and Rondric Davis were living in a house with their brother Aunriek. Aunriek’s girlfriend was living with the men in June 2010, when she overheard Hollis and Darrick planning a robbery either the day of or the day before the robbery took place because they needed money. She identified the AK-47 the police had seized from that residence as one she had seen there around the same time. After the robbery had been committed, Hollis, Darrick and

Rondric returned to the house; at one point the girlfriend said Rondric was carrying the AK-47 but later said it was Darrick. She also testified they returned with a BB gun she had seen in the house before. She explained Darrick had counted the money and split it between the men, giving some to Aunriek. There was also testimony from another witness who had overheard Hollis, Darrick and another individual who was often at the house, Mike McKoy, planning the robbery.

¶5 On the night of the robbery, three men wearing hoods over their heads, black clothing, and camouflage bandanas over their faces approached R.D. and M.R. after R.D. had locked the store for the night and was about to get into their car, intending to follow the store's closing procedures to make the nightly deposit at the bank accompanied by a witness. The man in the center and closest to R.D. put his hand on R.D.'s shoulder and said, "Be cool. Be cool. Just get into the car." According to R.D., the man had a "long weapon," not a handgun, which he "put . . . to [R.D.'s] stomach, cocked it back, and . . . said, 'Empty your pockets.'" M.R. also said she saw the man holding "a very large gun." R.D. emptied his pockets and gave the man the deposit bag. The men fled after one of the other two men said "We got to go," or "Let's get out of here."

¶6 Two witnesses who were leaving the mall saw three men in dark clothing walk by them; one of the witnesses saw what looked like an assault rifle, although she had not believed it was real. Another witness testified that while he was driving in the mall parking lot that evening, he had seen a woman standing by a car, holding a baby,

and trying to flag him down, looking nervous. The witness noticed three men by the car, one of whom “took off running with an AK[-47 assault rifle] along his side.”

¶7 Hollis, the Davises, and Michael McKoy went back to the Davises’ house and emptied the contents of the deposit bag onto a table, splitting the cash between them. According to McKoy, one of the Davis brothers had held the AK-47 and demanded money from R.D. Law enforcement officers ultimately searched the house pursuant to a warrant and found an AK-47. McKoy testified he and the Davis brothers had robbed R.D. at gunpoint, that a woman had been there who was carrying a baby, and that Darrick Davis was the one who had been carrying the rifle; he and Rondric Davis had carried BB guns. Hollis had driven them to the mall in a car McKoy had borrowed from his girlfriend, and had driven them back to the house when the robbery was completed, and shared in the proceeds of the robbery.

¶8 Hollis does not challenge the conviction for armed robbery and aggravated robbery of R.S. He only maintains that even under an accomplice theory of liability, there was insufficient evidence to support the aggravated assault of R.D. or the charges of disturbing the peace as to both R.D. and M.R. He argues that even though a jury could have inferred that he knew his codefendants would use a weapon to commit the robbery, “there is no indication that he could reasonably expect that one of the co-defendants would point the gun at the victim’s stomach and cock the weapon.” He makes a similar argument with respect to the charges of disorderly conduct, arguing there was insufficient evidence that he even “knew or intended that the co-defendants recklessly display a gun at either victim.” *See* § 13-2904(A)(6).

¶9 Section 13-301(2), A.R.S., defines “accomplice” as a person who, “with the intent to promote or facilitate the commission of an offense . . . [a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense.” Section 13-303(A)(3) provides that a person is “criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.”

¶10 Relying to a large degree on *State v. Johnson*, 215 Ariz. 28, 156 P.3d 445 (App. 2007), Hollis insists he could not be found culpable for these offenses because the evidence did not establish he had facilitated or promoted their commission or knew one of the codefendants would point a gun at R.D.’s stomach or handle the guns in a way that would disturb the peace of R.D. and M.R. But *Johnson*, like its precursor, *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002), was decided before the 2008 amendment of § 13–303(A)(3), which went into effect on September 26, 2008. See 2008 Ariz. Sess. Laws, ch. 296, § 2. Our supreme court concluded in *Phillips* that the defendant in that case could not be convicted of premeditated murder because the evidence did not show he had “intended to facilitate or aid in committing a murder,” rejecting the state’s argument that under accomplice liability a person may be held responsible for the reasonably foreseeable consequences of his conduct. 202 Ariz. 427, ¶¶ 34, 41, 46 P.3d at 1056-58. The version of subsection (A)(3) of the statute that existed before September 26, 2008, had provided a person could only be held “criminally accountable for the

conduct of another if . . . [t]he person [was] an accomplice of such other person in the commission of an offense.” 2008 Ariz. Sess. Laws, ch. 296, § 2.

¶11 By amending the statute, the legislature broadened the scope of accomplice liability, imposing criminal culpability for “any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.” § 13-303(A)(3). Thus, for offenses committed before the statute was amended, a person could be held criminally culpable under an accomplice theory of liability for only those offenses the defendant intended to aid or actually aided. Hollis committed the offenses in this case in June 2010, long after September 2008. Consequently, both *Johnson* and *Phillips* are of limited applicability here.

¶12 The trial court correctly instructed the jury on accomplice liability based on the statute’s current language. And the record contains substantial evidence to support the guilty verdicts for aggravated assault of R.D. and disorderly conduct as to R.D. and M.R. given those instructions. Hollis does not dispute that there was sufficient evidence from which the jurors could find he had intended to facilitate and did facilitate the armed robbery of R.D. There was evidence he helped plan the robbery and evidence supported the finding that he knew an AK-47 would be used in committing the offense. Evidence also established he knew R.D. would have the bank deposits in a deposit bag and would be walking to his car to go to the bank to deposit the money.

¶13 Reasonable jurors also could find that “a natural and probable or reasonably foreseeable consequence,” § 13-303(A)(3), of the offense of armed robbery was that one of the men would threaten and assault R.D. using the AK-47 during the course of the

robbery, notwithstanding Hollis's argument that a robbery can be committed without an assault. They also could find that another natural and probable or reasonably foreseeable consequence of this act was that at least one of the men would disturb R.D.'s peace and the peace of another person because (1) it was reasonably foreseeable a witness might come upon the men while they were robbing R.D. or that R.D. would not have been alone when the men robbed them, and (2) M.R. probably would be with R.D. As previously noted, Hollis admitted knowing M.R. and was aware she frequently accompanied R.D. to make the deposits.

¶14 For the reasons stated, we conclude there was ample evidence to support the convictions on the challenged counts. Hollis's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge